BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES D. FOLTZ	)	
Claimant	)	
	)	
VS.	)	
	)	
CORNERSTONE AG, LLC	)	
Respondent	)	Docket No. 1,021,685
	)	
AND	)	
	)	
PENN MILLERS INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the August 15, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

ISSUES

At the preliminary hearing held on August 11, 2005, the parties presented evidence bearing on the sole issue of whether claimant provided timely notice as required by K.S.A. 44-520. Following the hearing the ALJ awarded claimant temporary total disability benefits and the payment of medical bills, thereby implicitly concluding the claimant had met his evidentiary burden to establish notice of his December 2004 accident.

The respondent requests review of this determination, alleging claimant failed to provide notice within the ten day period set forth in K.S.A. 44-520 and further failed to establish "just cause" to extend the period to 75 days. In addition, respondent contends that claimant's position with respondent as CEO, coupled with claimant's knowledge of his December 2004 accident, does not satisfy the "actual knowledge" requirement of that same statute. Thus, the ALJ erred and the preliminary hearing Order should be reversed and set aside.

Claimant belatedly filed a brief, and asks the Board to affirm the ALJ's preliminary hearing Order. Claimant argues that, as the CEO for respondent, he is in effect the employer and his actual knowledge of the accident satisfies the ten day requirement. Alternatively, there was just cause to extend the time requirement for providing notice to 75 days from the date of the accident in December 2004 as claimant was not altogether certain he had sustained a new, separate and distinct compensable injury.[1]

The only issue to decide is whether claimant provided proper notice required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was the CEO for respondent's business, a grain elevator in Western Kansas. Not only was he the manager of the business, from time to time, he would be pressed into performing the work of others, including scale work (weighing incoming crop products) and ensuring that the grain was properly stored and shipped out. Claimant was also the individual who was charged with reporting work-related claims to the insurance carrier.

In late December 2004, claimant was told that several train car doors would not shut and could not therefore be loaded with grain. In order to avoid this (and maximize the train's efficiency), claimant took a sledgehammer and went out to the train and "physically beat the doors in to get them closed."[2]

Immediately after that activity, he suffered pain in his low back. Claimant had undergone surgery to his low back apparently due to a herniated disk 10 years earlier. And while he had done well for the first 3 years following surgery, over the last 7 years he had experienced low back pain off and on. On those times he would seek treatment from a local chiropractor and eventually, as he worked through the pain his symptoms would subside.[3] Claimant initially thought his pain in December 2004 was due to his earlier back problem and thought it would get better much like it had in the past.[4]

In this instance, claimant sought treatment from his chiropractor, but unlike earlier instances, his symptoms did not improve. Nevertheless, claimant continued to work his regular duties, albeit with difficulty. He did not inform respondent's Board of Directors, nor

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[1] P.H. Trans. at 21-22.

[2] Claimant's Depo. at 24.

[3] P.H. Trans. at 11.

[4] *Id.* at 11-12.

did he inform the Chairman of the Board, Brad Cowan, the individual he considered his supervisor of the accident. According to claimant, he did not often see Mr. Cowan, nor was he ever *required* to report injuries to either Mr. Cowan or the Board. However, claimant seemed to indicate he knew that a report was necessary. He testified that although he'd suffered back problems before while working, he did not file an accident report every time it happened.[5] And in this instance, he thought his back would get better.

Claimant elected to leave his position with respondent effective January 31, 2005. This decision was made, according to claimant, because of management issues and not because of his injury, although he admits his symptoms continued to increase as he worked through January 31, 2005. By the time he left his position with respondent, he began to have pain in his hips.

Claimant continued to treat with his chiropractor, but on February 5, 2005, he fell to the floor and was unable to stand.[6] He sought treatment from a local physician and a few days later he had a MRI of his lumbar spine. Claimant was then evaluated by a neurosurgeon and on February 19, 2005, he was told he had 3 herniated disks, L2-L4. Shortly thereafter, he had surgery. Following the multilevel procedure, he had physical therapy and eventually, he was released to return to work as of March 21, 2005.

At no time did claimant request respondent to provide medical treatment. Rather, all of his medical bills were submitted to his private health insurance carrier. Claimant and respondent agree that claimant provided notice of his injury and his written claim in a letter dated February 25, 2005. Other than that notice, both parties agree claimant provided no notice to anyone else within respondent's organization of his December 2004 injury or his surgery.

At the preliminary hearing, claimant's counsel contended that as respondent's CEO, his actual knowledge of an injury or an aggravation, satisfied the requisite notice compelled by K.S.A. 44-520. Additionally, claimant argues that he did not realize he had suffered a new, separate and distinct compensable injury until February 19th when the neurosurgeon told him he had 3 herniated disks. And that once he had that knowledge, he informed respondent shortly thereafter, by a letter dated February 25, 2005. Thus, there was just cause for his delay and the February 25, 2005 notice was within the extended 75 day period.

Respondent adamantly maintains that claimant was not the ultimate authority within respondent's business as held in *Wietharn*.[7] And as such, *his* actual knowledge is not

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[5] *Id.* at 11.

[6] Claimant's Depo. at 53-54.

[7] *Wietharn v. Safeway Stores, Inc.*, 16 Kan. App. 2d 188, 820 P.2d 719, *rev. denied* 250 Kan. 808 (1991).

sufficient under K.S.A. 44-520. Moreover, claimant's delayed awareness or knowledge of the extent of his injury does not invoke the "just cause" provision under the statute.

It is unclear from the ALJ's preliminary hearing Order whether she concluded that respondent had actual knowledge, based upon claimant's notice of his own injury, or that he satisfied the "just cause" provision. Because either alternative can salvage claimant's claim, both will be addressed.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, **except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary**. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to **just cause**, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice. (Emphasis added)

In considering whether "just cause" exists to extent the notice period, the Board has listed several factors which must be considered:

> (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
>
> (2) Whether the employee is aware he or she has sustained an accident or an injury on the job.
>
> (3) The nature and history of claimant's symptoms.
>
> (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

The difficulty here is that claimant's theory of recovery is internally inconsistent. On the one hand claimant contends that because he *knew* he had an accident, that purported "actual" knowledge should satisfy the notice provision required under K.S.A. 44-520. Yet, claimant testified that as the CEO, when he was informed of an accident he knew it should be referred to the workers compensation carrier and an accident report should be filled out.

He apparently did not follow this procedure in December 2004. And that failure suggests something other than actual knowledge.

On the other hand, he contends that while he knew he suffered an onset of pain, he *did not know* whether it was related to his earlier back problems or was a new and independent accident. And this lack of knowledge justifies the delay in notice. Moreover, claimant testified that his back condition continued to worsen from December 2004 through and up to his last date of work, January 31, 2005. Then, on February 5, 2005, he fell to the floor and could no longer walk. At that point, a day that was within ten days of his last date of work, claimant should have known that his back condition was not going to improve as it had on other occasions. Yet, he still did not inform respondent. He proceeded to seek treatment on his own handling it through his private insurance carrier. It was not until respondent received a letter dated February 25, 2005 that it was finally provided with notice of a work-related injury.[8] And there is nothing within the record to disclose why, approximately 2 months after his specific, acute injury, he decided to assert this workers compensation claim.

The Board has considered the parties' arguments and under these facts and circumstances concludes that respondent did not have "actual knowledge" of claimant's injury, nor has claimant established the requisite "just cause" to extend the notice period set forth in K.S.A. 44-520.[9]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated August 15, 2005, is reversed.

IT IS SO ORDERED.

Dated this _____ day of October, 2005.

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[8] The record establishes only the date the letter was written, not the date it was received by respondent.

[9] The Board further notes that even if claimant is successful in establishing "just cause" based upon a date of injury in December 2004, the Board finds that he has failed to meet his burden of proof. The record does not disclose what date in December this accident was to have occurred. Thus, it is difficult to determine whether the letter dated February 25, 2005 can be considered notice that is within the 75 day period.